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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 570

FREDERICK BLAUSTEIN, *Appellant*,

v.

CAESAR L. AIELLO, Substituted Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MOTION TO DISMISS

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STATEMENT OF THE CASE

Forest Knolls, Inc., was engaged in the business of developing real estate for residential purposes. On September 30, 1958, this corporate debtor executed a deed of trust on the properties in question (Lots 14, 15, 17, and 18 in Block L of the Forest Knolls Subdivision) to Suburban Trust Company, as Trustee, to secure the payment of a debt due Home Federal Sav-

ings and Loan Association. Later, this encumbered property became a part of the estate of the bankrupt Forest Knolls, Inc., when an involuntary petition for its re-organization was filed and approved in April, 1960.

On June 16, 1961, the trustee in the re-organization proceedings was authorized and directed to sell *subject to all liens*, all right, title and interest of the trustee and the estate in bankruptcy in the encumbered properties by delivering a quitclaim deed to Frederick Blaustein, the appellant. (E. 29).

Subsequent to the completion of this transaction, Home Federal Savings and Loan Association, the creditor, by a duly executed and recorded deed of appointment in August, 1961, substituted Caesar L. Aiello, appellee, as trustee in the place and stead of Suburban Trust Company. The creditor's petition to ratify the substitution of trustee was ratified and confirmed by the Circuit Court for Montgomery County on August 24, 1961. (E. 11).

Foreclosure proceedings were instituted thereafter by the substituted trustee and the foreclosure sale was held on September 21, 1961. The appellant filed exceptions to these proceedings and after a full hearing, the Circuit Court for Montgomery County overruled them. This decision was affirmed by the Court of Appeals of Maryland. In a unanimous opinion, it held that the state foreclosure proceedings in no way conflicted with the provisions of the Bankruptcy Act and that under the terms of the deed of trust, there had been no denial of due process.

From this decision of the Court of Appeals of Maryland, the appellant now seeks review by this Court.

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. Opinion Rests on Adequate Non-Federal Grounds and Would Not Be Affected By Decision on Federal Question

The jurisdiction of the Supreme Court in this case is based upon Title 28, United States Code, section 1257(2) which allows a direct appeal whenever a state statute is challenged as repugnant to the Constitution of the United States. The claim of the appellant rests upon the assertion that the Maryland statute which allows the ex parte substitution of trustees violates the due process clause of the fourteenth amendment of the Constitution. To be specific, it is now argued by the appellant that failure to notify Mr. Blaustein of the substitution of Caesar L. Aiello as substituted trustee under the deed of trust was a denial of due process. An analysis of this case however will disclose that this allegation by the appellant is not justified by the facts.

It has been a basic and longstanding policy of this Court to refuse to consider any constitutional questions raised for the sake of jurisdiction but not required for the full and final disposition of a controversy. It has wisely declared that it will not make any unnecessary constitutional determinations. *City of Meridian* v. *Southern Bell T. & T. Co.*, 358 U.S. 639 (1959). In other words this Court properly should deny an appeal based upon the challenge of a state statute when the clause in question was not an essential element of the decision.

In the instant case, the Court of Appeals of Maryland, 229 Md. 131, 138, held that "the right to notification may be waived by the person for whose benefit it is exactable: it is on this theory that contractual pro-

visions for notification may be waived by the person for whose benefit they might have been included in the contract." Clearly the appellant purchaser stood in the shoes of the bankrupt debtor which had agreed in precise, unequivocal terms to a substitution of trustees at any time without requiring that it be notified thereof. The deed of trust expressly provides (E.6):

> "And it is further covenanted and agreed that the holder of the note secured by this deed of trust or assigns shall have power to be exercised at any time hereafter to substitute a trustee or trustees in the place of the trustee herein named by an instrument in writing duly executed, acknowledged and recorded among the Land Records as provided by law, and that when such an instrument is recorded all of the estate of the trustee thus superseded shall determinate and the title to the hereinbefore described land heretofore vested in such trustee shall cease and terminate and shall be vested in the trustee or trustees named as its successors, who shall have the same powers, rights and duties as the trustee so superseded had under this deed of trust. The exercise of this right to appoint a successor trustee, no matter how often exercised shall not be deemed an exhaustion of said right."

Thus appellant's right to notice had been waived as a matter of contract law and such waiver was authorized under both the general law and the specific Maryland statute which is now being challenged. Since the appellant had no legal right to notice, by the terms of the deed of trust, notice was denied. Inasmuch as the state statute, which appellant argues was a denial of his constitutional right to due process, was not an essential element of the decision, this appeal should be dismissed. *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118 (1939).

Nor does the allegation that the appellee, Mr. Aiello, had no power of sale as the substituted trustee have any bearing upon the question in issue. The appellant has stated that a corporation under Maryland law may not exercise a power of sale. We agree that this is a correct legal proposition but this in no way prevented Mr. Aiello, the substituted trustee, from making a sale. The deed of trust gave him the "same powers" as the previous trustee. Obviously these "same powers" were the broad general powers, one of which was a power of sale granted by the original grantor in the trust instrument and the individual trustee is not limited by any peculiar disability of a prior trustee.

In *Maslin* v. *Marshall*, 94 Md. 480, 51 A. 85 (1902), the original trustees assigned a mortgage to a corporation which assigned it to Maslin who exercised the power of sale contained in the mortgage instrument. Here the Court of Appeals, after referring to the *Frostburg* and *Queen City* cases cited by the appellant, said that assuming the corporation "was incapable of executing the power, it does not follow that when the mortgage came to be vested in the appellee (Maslin) who is entirely unaffected by such incapacity, he should be deprived of what was intended to be part of the mortgage security. The inability of the Safe Deposit Company to execute the power of sale did not arise from any defect in the power, but from the infirmity of the company itself. . . . It [the power of sale] must upon principle be held to have been exercisable by all such assignees except insofar as they may by reason of their own disability have been incapable of executing it."

Thus, if appellant's argument was carried to its logical conclusion it would result in the contention that

after a trustee, who could not exercise any powers because of his insanity, was removed, his successor would also be unable to act. Such a conclusion is obviously erroneous and contrary to the intent of the parties to the trust instrument and the statement of appellant that the court created a power of sale where there was none previously is untenable and wholly without merit.

At any rate appellant is barred from making any such assertion at this time. This question was neither raised nor preserved in the trial in the Circuit Court for Montgomery County, Maryland, nor was it presented in the Court of Appeals of Maryland. The Supreme Court has steadfastly held in the past that an argument cannot be presented on appeal for the first time. *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190 (1925); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940).

It is therefore strongly urged that this motion to dismiss be granted on the grounds of lack of jurisdiction since there is no merit to the allegation that the Maryland statute violates the United States Constitution. Under the facts of this case it would be unnecessary and inappropriate at the present time to render a judicial determination of the issue raised by the appellant. In short, the decision below rested on adequate non-federal grounds and this appeal should be dismissed since the constitutional issue is not ripe for review. *City of Meridian v. Southern T. & T. Co.*, *supra*.

B. Mere Assertion of Substantial Federal Question Is Not in Itself Sufficient to Give the Supreme Court Jurisdiction Without a Plausible Foundation for Such Claim

Appellant suggests that the foreclosure proceeding in the state court, in the absence of an order of the United States District Court specifically authorizing the proceedings, raises an important and substantial issue as to the meaning of Section 148 of the Bankruptcy Act and the jurisdiction of the bankruptcy court. This argument by the appellant is wholly without foundation. The Court of Appeals of Maryland in its opinion, based on the record, holds that the bankruptcy court in ordering and confirming the sale of the subject property to the appellant, had divested itself of any further jurisdiction over the property. This finding of fact does not contravene or interpret any section of the Bankruptcy Act and certainly does not invade or limit the jurisdiction of the bankruptcy court. Clearly, the naked assertion of an important and substantial federal question does not constitute a plausible foundation for such claim.

It is well established law that a bankruptcy court may in the interest of general creditors regulate the method of enforcing pre-existing liens against a debtor's property in order to realize as much as possible from the bankrupt's equity. It may sell the property free from the lien and award the lien holder a preferential payment representing the proceeds of his lien, *Re Oneco Milling Co.*, 109 F. 866 (5th Cir. 1901) or the bankruptcy court may, in its discretion, sell merely the bankrupt's equity in the property, that is, sell the property subject to encumbrances, as in the instant case, and leave the lienor to enforce his liens upon the

property by appropriate proceedings. *Re Gerry*, 112 F. 958 (E.D. Pa. 1902).

In the instant case the trustee in bankruptcy found that it was in the best interests of the estate and its creditors to sell the property of the bankrupt subject to liens and encumbrances, and the secured creditors left to their remedies against the property. In his petition (E.42) he stated

> "9. Your petitioner does not believe that other offers will be received for these six lots. He therefore, considers these offers to be in the best interests of this estate and of its creditors.
>
> "Wherefore, your petitioner prays that this Court enter an order authorizing the sale of Block B, Lot 18, Block H, Lot 38, and Block L, Lots 14, 15, 17 and 18, subject to liens and encumbrances, by giving to the undisclosed principal of Albert A. Rapoport, who shall be disclosed prior to the passage of the order prayed, a quitclaim deed or quitclaim deeds therefore. . . . ."

The order of June 16, 1961, (E.29) of the United States District Court for the District of Maryland provided that the trustee "is hereby authorized and directed to sell subject to all alleged liens, all right, title, and interest of said trustees and of this estate in . . . Block L, Lots 14, 15, 17 and 18, in Forest Knolls Subdivision, Montgomery County, Maryland, by delivering unto Frederick Blaustein, . . . a quitclaim deed or quitclaim deeds for said properties . . . ."

Since the effect of this was the sale of whatever title the bankrupt had to the purchaser, it is strongly urged that the Court of Appeals of Maryland did not err in its findings. In a unanimous opinion, the Court held it was clear that the jurisdiction which the circuit

court had over the property in question, before it came under the exclusive jurisdiction of the bankruptcy court in the course of the reorganization proceeding, was effectively restored to the circuit court when the bankruptcy court, in ordering and confirming the sale to the appellant, thereby divested itself of any further jurisdiction over the property. *Beall* v. *Walker*, 26 W. Va. 741 (1885); *J. M. West Lumber Co.* v. *Lyon*, 116 S.W. 652 (Tex. Civ. App. 1909).

In *Gotkin* v. *Korn*, 86 U.S. App. D.C. 372, 182 F. 2d 380 (1950) where there had been a sale of chattels of a bankrupt by his trustee subject to existing liens and a subsequent action for a declaratory judgment as to the respective rights of the lienor and the purchaser of the chattels sold, the Court of Appeals held:

> "[T]hat when, as here, the bankruptcy court chooses to sell encumbered property subject to liens, it elects to sell only the bankrupt's equity therein and so, in effect, declines to exercise its exclusive power to deal with the liens, and relegates their holders to the enforcement remedies which would have been available to them, had the lienee's bankruptcy not occurred."

See *Nixon* v. *Michaels*, 38 F. 2d 420 (8th Cir. 1930), and *In re Krull*, 295 Fed. 520 (E.D. N.Y. 1923).

Thus it is submitted that the bankruptcy court had exhausted its jurisdiction over the subject property.

In short appellant's argument that the foreclosure proceeding without an order of the bankruptcy court was invalid is wholly devoid of substance. The property with which we are concerned was clearly not that of the bankrupt debtor (Forest Knolls, Inc.) at the time the foreclosure proceeding was instituted by the

substituted trustee. The sale by the trustee in bankruptcy ratified and confirmed by the bankruptcy court, passed whatever interest the bankrupt debtor had in the property to the purchaser, the appellant in the instant case. See *Coulter* v. *Blieden*, 104 F. 2d 29 (8th Cir.), cert. denied, 308 U.S. 583 (1939); *In re Strunks Lane and Jellico Mountain Coal & Coke Co.*, 64 F. Supp. 731 (D.C. Ky. 1946); *Crane* v. *Crane*, 341 Ill. 363, 173 N.E. 352 (1930).

The appellant does not cite any authority to challenge the foregoing arguments and cases. As was noted by the Court of Appeals of Maryland in its decision, none of the three cases cited by the appellant concerned property sold by a bankruptcy trustee subject to a lien. The *Central Hanover* and *Central States Life Insurance* cases merely support the proposition that the ending of a stay prohibiting commencement or continuation of any action at law or suit or proceeding in equity against a debtor is within the discretion of the Bankruptcy Court. Likewise *In re Long Island Properties, Inc.*, is not in point concerning property sold subject to liens by a trustee in bankruptcy. It held merely that a foreclosure sale in a state court, after the entry of an order in a reorganization proceeding restraining such sale, was void for want of jurisdiction. Nowhere in the opinion is there any reference to retained jurisdiction over property sold by a trustee.

CONCLUSION

The bankruptcy court having ordered and confirmed the sale of the subject property to the appellant, thereby divested itself of any further jurisdiction over the property. The appointment of the substituted

trustee was a matter of public record, was in strict compliance with a right and privilege conferred upon the creditor by the terms of the deed of trust and was in compliance with authority granted by statute and rule. It is respectfully submitted that the appeal should be dismissed because no substantial federal question is to be found within the facts of this case. The opinion of the Court of Appeals of Maryland rests on adequate non-federal grounds. It would not be affected by decision of this Court on any federal question and no plausible foundation has been established to support the naked assertion of substantial federal question.

Respectfully submitted,

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